The only question that this court has to determine is whether the applicant has proved to this court that she is a person in respect of whom a Banishment Order cannot be made. I emphasize that the onus of proof lies upon the applicant. In her testimony the applicant stated quite clearly that she is not a citizen but a person granted only with permanent residence. To succeed in her application it is for the applicant to prove that she is the particular person or persons of specified class provided under an order under section 12 of the Ordinance. Who is an exempted person? Section 2 of the Banishment Ordinance defines an exempted person to mean "person exempted from the provisions of sections 5 and 8 by any order made under the provisions of section 12." In that event it is necessary to determine in the light of section 12 whether any order has been made pursuant to that provision. Section 12 reads —

"12. The Minister may by order direct that any particular person, or persons of any specified class, shall be exempt, either unconditionally or subject to such condition as the Minister may impose, from the provisions of sections 5 and 8."

In his testimony Tan Sri Datuk Ibrahim Ali, Permanent Secretary to the Ministry of Home Affairs, stated quite clearly that there was no order made pursuant to section 12 of the Ordinance by the Minister concerned the previous one or the present one. The applicant was only given an entry permit and allowed permanent stay. In view of this I fail to see how the applicant can succeed in establishing that she comes under the category of an exempted person. For this reason alone, I think, the applicant has failed to satisfy me that she is a person against whom a Banishment Order cannot be made. I would therefore dismiss this application.

Application dismissed.

Solicitors: *Dulip Singh & Co.*

H.M.T. v. DIRECTOR GENERAL OF INLAND REVENUE

[O.C.J. (Abdul Hamid J.) April 16, 1974]

[Kuala Lumpur — Originating Motion No. 12 of 1974]

Income Tax — Payment to employee at end of contract — Payment made ex gratia — Whether gratuity or compensation for loss of office — Income Tax Ordinance, 1947, ss. 10 & 13.

The appellant had been employed by the United Plantations Ltd. (the company) under three separate contracts of service which ran consecutively. The last contract was terminated by the company in accordance with its terms, the appellant being paid his normal salary and allowances up to his last day of leave in accordance with the contract. Thereafter, the appellant was paid by the company the sum of $74,954.32 as "gratuity on retirement". The Special Commissioners confirmed the assessment of income tax on the basis of that sum. The question for determination was whether the payment was compensation for loss of office or gains or profits in respect of the employment. The Revenue alleged that —

(i) the payment was a gratuity within the meaning of the Income Tax Ordinance 1947 viz: gains or profits from employment and was not a retiring gratuity;

(ii) it was an ex gratia payment and not compensation for loss of office;

(iii) the payment was made in respect of the appellant's employment with the company.

Held: the payment made to the appellant was a gratuity paid in respect of the appellant's employment with the company. The payment was not paid upon the retirement of the appellant or following any particular scheme drawn up by the company and neither was it paid pursuant to any provision in the service agreement. Although the company made the payment on its own accord it was clearly meant to be an ex gratia payment made in reference to the services rendered by the appellant in the nature of a reward at the end of the contract. Such payment was therefore gains or profits from an employment in respect of which tax was assessable.

Cases referred to:-

(1) *Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society* 30 T.C. 11 at p. 25.

(2) *Henriksen* v. *Grafton Hotel Ltd.* [1942] 2 K.B. 184 at p. 189.

(3) *Chibbett* v. *Joseph Robinson* 9 T.C. 48.

(4) *Henry* v. *Foster* 16 T.C. 605.

(5) *Comptroller General of Inland Revenue* v. *T.* (*Knight's* case) [1972] 2 M.L.J. 73.

(6) *H.* v. *Comptroller General of Inland Revenue* [1973] 2 M.L.J. 40 (*Heywood's* case).

(7) *Beynon* v. *Thorpe* 14 T.C. 1.

(8) *Cowan's* case 7 T.C. 372.

(9) *Edwards (Inspector of Taxes)* v. *Bairstow* [1956] A.C. 14, H.L.

ORIGINATING MOTION.

S. Woodhull for the appellant.

Mohamed Nizar bin Idris for the respondent.

Abdul Hamid J.: This is a case stated by the Special Commissioners for the opinion of this court pursuant to paragraph 34 of Schedule 5 to the Income Tax Act, 1967.

The appellant is dissatisfied with the decision of the Special Commissioners confirming the assessment of income tax for the year of assessment 1965 on the basis that payment of $74,954.32 to him by the United Plantations Limited Jendarata Estate Telok Anson (hereinafter referred to as "the company") was a gratuity paid in respect of his employment with the company and not compensation for loss of office.

The facts found by the Special Commissioners were as follows —

The appellant was first employed as an assistant by the company on January 16, 1955 on contract for a term of four years. Subsequently he was again employed on a second contract for a term of three years. The third and final contract of service between the appellant and the company was signed in Denmark on January 18, 1962 for a term of three years commencing on April 28, 1962. It was the practice that all contracts of service of expatriate staff were made and signed in Denmark. In all the appellant was employed for a period of just over ten years.

The appellant left Malaysia for Denmark on March 9, 1965 on completion of the contract on five months' leave due to him under the third contract of service with a return ticket for himself and his family.

The appellant's employment with the company ceased on August 3, 1965, on the expiry of his leave. He was informed by his employers in Denmark that they were terminating his contract of service with the company and was given the requisite notice of termination in accordance with clause 14 of the contract.

The appellant was paid his normal salary and allowances up to the last day of leave.

On April 14, 1966 the appellant was paid by the company a sum of $74,954.32 following a decision of the Board of United Plantations Limited held at Copenhagen on March 23/24, 1966 to grant the appellant this amount "as gratuity on retirement."

The appellant, 34 years old at the time of the termination of the final contract, went into farming in Denmark.

At the hearing before the Special Commissioners the appellant contended that —

(i) the payment of $74,954.32 made to the appellant by the company was a capital sum and, therefore, not assessable to tax under the Income Tax Ordinance, 1947;

(ii) the payment of this particular sum was not specifically charged under the Income Tax Ordinance, 1947;

(iii) this was a voluntary payment not in respect of employment, and, therefore, outside the scope of the Income Tax Ordinance, 1947; and

(iv) in the alternative, it was a retiring gratuity within the meaning of section 13(1)(i) of the Income Tax Ordinance, 1947.

The Revenue's contentions were briefly as follows —

(i) that the payment was a gratuity within the meaning of the Income Tax Ordinance, 1947, namely, "gains or profits from employment", and was not a "retiring gratuity";

(ii) that the payment made to the appellant was not a capital payment. It was not a compensation for loss of office but an ex-gratia payment; and

(iii) that the payment made to the appellant was in respect of his employment with the company.

The decision of the Special Commissioners was founded upon the following grounds —

(i) the appellant's services were terminated in accordance with the terms of his contract of service and there was no premature termination of employment and hence the payment made to the appellant could not be compensation for loss of employment;

(ii) the payment to the appellant was not a retiring gratuity within the meaning of section 13(1)(i) of the Income Tax Ordinance, 1947, as the appellant did not retire from the service of the company. In point of fact, the contract of the appellant was not renewed; and

(iii) the sum of $74,954.32 granted to the appellant by the United Plantations Limited was a gratuity, paid in respect of his employment with the company for a period of just over 10 years, within the meaning of section 10(2)(a) of the Income Tax Ordinance, 1947, and, therefore, assessable to income tax under the provisions of section 10(1)(b) of the said Ordinance.

At the hearing before me the appellant was relying on the same grounds raised before the Special Commissioners, and one other additional ground as follows —

"that there was no evidence upon which the Special Commissioners could have supported their determination of fact."

It might be convenient at this point to state that as for the payment it is common ground that "the question always is what is the real character of the payment, not what parties may call it." [*Commissioners of Inland Revenue* v. *Wesleyan and General Assurance Society*[1] per Viscount Simon]. (See also *Halsbury's* Laws of England third edition volume 20 page 1). To determine the character of the payment it is useful to refer to the case of *Henriksen* v. *Grafton Hotel Ltd.*[2] cited to me by Mr. Woodhull counsel for the appellant where Lord Greene M.R. in his judgment said —

"For this purpose the first thing to do is to examine the nature of the payment, that is to say, the nature of the subject in respect of which the payment is made. In this connection the manner of payment may be relevant and throwing light upon its nature. In many cases — and in my opinion this is one of them — the question will be found to answer itself once the true nature of the payment is ascertained."

I shall now proceed to consider the appellant's contention that the payment was for loss of employment or office. The following authorities were cited in support of the contention —

(a) *Chibbett* v. *Joseph Robinson;*[3] and

(b) *Henry* v. *Foster.*[4]

Mr. Woodhull submitted that the Privy Council in *Comptroller General of Inland Revenue* v. *T.* (*Knight's* case[5]) considered the decision in *Chibbett's* case "a right decision in law." *Chibbett's* case was a case where the ship managers were employed or did business with the company and they got their percentage as part of their remuneration. The company which they had served was being wound up and they were losing something. The sum of £50,000 granted by the company to the ship managers were "as testimonial for what they had done in the past in their office which had now terminated."

Now, in *Knight's* case two propositions were in the first place accepted as common ground —

(a) where a sum of money is paid under a contract of employment, it is taxable even though it is received at or after the termination of the employment; and

(b) where a sum of money is paid in consideration for the abrogation of a contract of employment, or as damages for the breach of it, that sum is not taxable.

To bring its case within the first proposition the Revenue contended that a new term introduced by the management into the contract of employment, namely, an intimation that it would consider payment of redundancy pay to the surveyor concerned should a staff surveyor become redundant, was an offer that the respondent must be taken to have accepted by remaining in the employment. Lord Wilberforce delivering the judgment of the Board affirmed the judgment of the Federal Court and rejected the Revenue's contention. The Board held that the management's letter of 6th February drawing the attention to the redundancy pay

was "nothing more than an expression of the company's intention and called neither expressly nor by implication for any acceptance or reaction by the respondent."

The Board was also of the view that the expression "would consider payment of redundancy pay" was quite inappropriate if a variation of the contract was intended. Lord Wilberforce emphasized that — "Mere silence in the face of such an expression of intention cannot be taken as assent to a contractual change." In considering *Knight's* case it might also be useful to look at the judgment of the Federal Court — [1970] 2 M.L.J. page 35 — where Gill F.J. delivering the judgment of the Federal Court held that the company was not obliged under the contract of employment to pay the respondent as "there never was any agreement as regards the clause relating to the termination of the respondent's employment." His Lordship at page 39 said —

"The determining factor in the present case is that the payment to the respondent, whatever the parties may have chosen to call it, was not a payment which the society had contracted to make to the respondent as part of his remuneration for his services as a staff surveyor. It was therefore in no way related to compensation for the past services rendered by the respondent. But for the subsequent agreement, to which I have referred earlier in my judgment. the society was under no legal obligation to make payment in respect of the so-called redundancy pay. Clearly, therefore. the amount of $28,050 was paid to the respondent for the release of the society's obligations under the contract of employment. In other words, it was a payment of compensation for the total abrogation of the service contract as from 1st December, 1965 following a prior agreement or understanding."

Gill, F.J. held that the respondent's employment was one which was likely to continue. His Lordship's reasons in saying this appear at page 38/39 where he said —

"As regards the duration of the respondent's employment, it is clear, as stated by the Special Commissioners, that he had no absolute right to be employed up to a certain date, because under the terms of his contract of service his employment was liable to be terminated at any time by his employers giving the requisite notice. In other words, it was open to the society, when they decided that the respondent should go, to get rid of him by giving him three months' notice under the agreement. But they chose not to do so. Obviously they had no such intention, because no reputable society would mete out such shabby treatment to a long-standing and faithful servant. Their policy was to replace expatriate officers by local officers, but they also had in mind their moral, if not legal, obligation to provide suitable compensation in pursuing that policy. It would therefore be correct to say that the respondent's employment was an employment which was likely to continue so long as he carried out his duties faithfully and until the society decided to ask him to go by offering him reasonable compensation for loss of his career."

The reasons that led the Federal Court to conclude that the redundancy pay was in fact for loss of office are set out at page 37 where Gill, F.J. said —

"It would appear clear therefore that redundancy pay was in fact tied up with loss of office by virtue of Mr. T.'s appointment being Malayanised. Again, the secretary's statement that, there being sufficient local surveyors to take over the duties of expatriate officers, Mr. T. was declared redundant at the end of November, 1965 was also not challenged. Bearing in mind the ordinary dictionary meaning of the word 'redundant' to be 'superabundant, superfluous or excessive', and the fact that Mr. T. became redundant not because his post was abolished but because there were suitably qualified local officers to take his place, this was not a case of redundancy in the true sense of the word. It therefore follows that his so-called redundancy pay was in fact Malayanisation money or compensation for loss of office."

The facts of the present case, however, materially differ from the facts in *Knight's* case. In the present case there were, in all, three contracts entered into between the appellant and the company. The last contract concluded on January 18, 1962 was for a term of three years. Under the contract there was, as in *Knight's* case, no obligation on the part of the company to make any payment to the appellant. However, it is pertinent to observe that the appellant's service under the contract was for a specified number of years whereas in *Knight's* case the employment was not for any fixed period even though, in both cases, there was a provision to the effect that either party may terminate the agreement by three months' notice in writing. T's service was in fact in the nature of a general hiring terminable by either party giving to the other not less than three calendar months' notice in writing to expire it at any time. Under those circumstances T's employment was deemed to be a continuous employment or, to describe it in the words of Gill, F.J., "an employment which was likely to continue so long as he carried out his duties faithfully until the society decided to ask him to go. . . ." The same cannot be said of the present case. The fact that the appellant had to enter into a new contract of service for each new term signifies that there was no continuity in the employment. The appellant's continued employment rested entirely with the company. The company alone was to decide whether it would renew the appellant's contract of service. The appellant could not therefore reasonably assume that he would enjoy a continuous service, whereas, in *Knight's* case the nature of the hiring was such that it was reasonable for T to assume a continuous service ceasing only when told to go by the company.

In the present case the appellant's contract of service was terminated at the expiry of the contractual period and the company was not obliged to offer the appellant further employment. The fact that the appellant was provided with a return ticket to Malaysia for himself and his family before he left Malaysia on March 9, 1965, did not necessarily mean that his contract of service would be renewed as at that point the company had not made any decision to renew the appellant's contract of service.

Encik Nizar argued that the present case may be distinguished from *Knight's* case where the employment was in the nature of a general hiring in that the service contract did not specify the number of years that T was to be employed. It was reasonable for T to expect to be hired at least until the age of 55. Encik Nizar invited the court's attention to the case of *H.* v. *Comptroller General of Inland Revenue*[6] which it is submitted bears fully upon the determination of the present case.

Encik Nizar also submitted that the appellant was hired for fixed periods and he therefore knew when his employment was to be terminated. Referring to the dicta of Rowlatt J., Encik Nizar argued that the dicta is not applicable to a person on a contract similar to the appellant. He drew my attention to the judgment of Suffian, F.J. (as he then was) in *Heywood's*

case where the test of Romer, J. in *Henry* v. *Foster, supra,* was favoured in preference to Rowlatt, J's test in *Chibbett's* case. I have read the judgment very carefully and in particular I refer to page 45 where His Lordship said —

"With respect we do not agree with the test as laid down by Rowlatt J. With respect we prefer to follow the test laid down by Romer J. in *Henry* v. *Foster (supra)* where he said when referring to compensation for loss of employment:"

Mr. Woodhull argued that *Knight's* case is the first and only case of its kind concerning a payment in the nature of the present appeal. With respect I hardly think so. Although it is true that there, as in the present appeal, the Revenue was also seeking to charge under section 10(1)(b) as defined in section 10(2)(a) of the Income Tax Ordinance, 1947, the payment was held to be compensation for loss of office which T had every reasonable prospect of continued employment. The finding was arrived at in the light of the facts of that particular case. In the present case Mr. Woodhull sought to establish that the facts conclusively establish that the appellant's employment was one that was likely to continue and that the appellant had reasonable expectation of continuing in the employment until the retirement age. I have very carefully analysed the facts which learned counsel for the appellant has set out in his written submission. It is common ground that the Standard Terms for expatriate staff members formed part of the terms of the contract of service, however, the Standard Terms must, I think, be read together with the service agreement. Mr. Woodhull stated that paragraph 8 of the Standard Terms provided for a continual renewal of period contracts with salary increments. I regret to say that I can find no such provision. Paragraph 8 relates to the rate of commission an employee is entitled to receive monthly pursuant to clause 8 of the service agreement.

As for the overseas leave the Standard Terms did make provision for leave on reaching retirement age, that is, the age of 55 or on premature retirement because of illness but to my mind such provision cannot apply to the present case by reason of paragraph 9(i) which reads —

"9. The employee will be entitled to overseas leave in his country of domicile

(i) on the completion of an *agreed period of service as set out in the agreement* attached to this schedule."

Mr. Woodhull also submitted that paragraph 12(iii) of the Standard Terms envisages and provides for a return to Malaysia on expiry of such leave. That might be true but that provision must clearly be read subject to the following clause set out in that paragraph —

"... unless notice has previously been given terminating his service under this agreement." [Paragraph 12(iii)].

Paragraph 16 is a provision dealing with cost of passages. The appellant might indeed have been provided with a return ticket to Malaysia for himself and his family when he left Malaysia on March 9, 1965 but that should not be construed to mean that the appellant's employment was one that was likely to continue. The appellant was returning to Denmark on leave. He was fully aware that his employment would cease unless his contract was renewed.

Mr. Woodhull's claim that the company had clear plans for the management placement of the appellant upon his return from leave was not quite valid. The letter [Exhibit A2(c)] from the General Manager of the company in August 1964 addressed to the Chairman of the company merely contained proposals. Reference to the appellant's return cannot, as such, be described as the company's plan at all. It is true that the appellant left much of his belongings in Malaysia in anticipation of a return to Malaysia, nevertheless he knew that the decision for the renewal of his contract had yet to be taken by the company at its Board meeting.

It is also the appellant's contention that his employment was terminated as a result of the implementation of the company's Malayanisation Policy following circular notification dated May 7, 1965 while he was on leave. I have in this regard drawn my attention to the contents of the circular letter under the heading "Malayanisation in Commerce and Industry." The first paragraph states clearly that the purpose of the circular letter was to inform members on recent developments on the Immigration Policy in Malaysia. The rest of its contents dealt with the proposed review of the Malayanisation in Commerce and Industry. In this regard it is pertinent to take into account the fact that the Standing Committee of officials on Malayanisation in Commerce and Industry had not asked for the confidential statement of Management positions until November 11, 1965 long after the company terminated the appellant's services. And furthermore submission to the Cabinet Committee was only made in the later part in the year. The company's confidential statement of management officials was only submitted on January 12, 1966. Commenting on this Encik Nizar argued that the company in June 1965 was not even aware of the full Malayanisation programme. Subsequent to the termination of the appellant's employment the secretary of the company, in reply to a letter sent by the Revenue Department, wrote in to say that the reason why the company had to dispense with the appellant's services was the more stringent Malaysian Policy which was implemented by the Immigration Department. In this connection the Special Commissioners I think, quite rightly took into consideration the fact that the Standing Committee had set the date for the reduction of expatriate staff at 1970. In my judgment the Special Commissioners quite rightly arrived at a finding that the appellant's services were terminated in accordance with the terms of his contract of service and that there was no premature termination of his employment as in *Knight's* case.

The relevant provisions that the Special Commissioners had to consider were sections 10 and 13 of the Income Tax Ordinance, 1947. *Heywood's* case cited by Encik Nizar to support the Revenue's contention dealt with the question of payment of compensation in the light of the 1967 Act section 3(a), 13(1)(a) and (e) and Schedule to paragraph 15(1)(b).

Section 10 sub-section (1)(b) and sub-section (2)(a) provide —

"10. (1) Income tax shall, ... be payable ... upon the income of any person accruing or derived from the Federation ... in respect of —

(b) xx

(b) gains or profits from any employment;

(c) xxx

(2) For the purpose of paragraph (b) of sub-section (1) .... 'gains or profits from any employment' means —

(a) any ... gratuity ... paid in respect of the employment...;"

Section 13(1) provides —

"13. (1) There shall be exempt from tax

(a) ...

(i) sums received by way of retiring ... gratuities..."

In this respect Mr. Woodhull submitted that compensation for loss of employment is not income under the 1947 Ordinance. Under the 1967 Act it is deemed to be income but is partially exempt income. He referred to section 13(1)(e) of the 1967 Act the relevant part of which provides —

"13. (1) Gross income of an employee in respect of gains or profits from an employment includes —

(e) any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of employment,..."

It is submitted that the later Act imposes a new liability, extends the burden and alters the intention of the Ordinance of 1947. In my judgment it is not open to dispute that the 1947 Act does provide that income of an employee in respect of gains or profits from an employment includes any amount received by the employee by way of compensation for loss of the employment. Equally it is also not open to dispute that payment received by way of compensation for loss of employment is not included as income under the 1947 Ordinance. The question that calls for determination is whether the payment was compensation for loss of office or gains or profits in respect of the employment. In determining this question circumstances pertaining to that particular employment must first be taken into consideration. They are likely to throw some light as to the nature of hiring which to my mind, is a relevant factor in ascertaining the nature of the payment.

In this connection, I am inclined to agree with the Revenue's contention that *Heywood's* case would bear fully in the determination of the present case. Although *Heywood's* case was decided in the light of the provision under the 1967 Act, the question that called for consideration was basically the same as in the present case, namely, whether or not the payment was compensation for loss of employment. In that case the taxpayer was employed under five separate contracts for fixed periods and his final contract of service was terminated by three months' notice in writing. In this regard Gill, F.J. in his judgment at page 42 said —

"In my judgment, the fact that certain rules of the company which were applicable to permanent employees were also made applicable to the appellant cannot alter the fact that each of his 'tours of duty' was a contract of service for a definite time. His having been re-engaged on a fresh contract on the expiry of each of his previous contracts over a period of 17¼ years did not make him a permanent employee as in the cause of a general hiring for an indefinite time. It was on the basis of the distinction between a contract for a fixed period and a contract of general hiring that the Special Commissioners made their deciding order..."

"I am of the opinion that they were right in thus distinguishing this case from *T's* case. It is true that the contract of service in *T's* case was also liable to be terminated at any time by the employers giving three months' notice. but it was none the less a contract of general hiring for an indefinite time so as to be a contract of 'continuous employment' as the Special Commissioners have described it, in my opinion quite rightly."

Suffian, F.J. (as he then was) in his judgment accepted the argument of the Revenue to the effect that the taxpayer's final contract of service was terminated by three months' notice in accordance with the terms of the contract and that the sum paid ex-gratia to him was not compensation for loss of employment but gratuity in respect of or having exercised employment so that it was gain or profit from the taxpayer's employment and therefore assessable to tax.

In the present case the appellant's contract of service was also terminated in accordance with the terms and at the expiry of the contract. The company took a decision at its Board meeting on March 23/24, 1966 to pay the appellant a sum of $74,954.32 describing the payment as "gratuity on retirement." Before I proceed any further I would at this point pause to consider the appellant's contention that, in the alternative, the payment, if at all income, was a retiring gratuity and therefore exempt from tax under section 13(1)(i) of the 1947 Ordinance.

In this regard the Special Commissioners held that the payment to the appellant was not a retiring gratuity within the meaning of section 13(1)(i) of the Income Tax Ordinance, 1947, as the appellant did not retire from the service of the company. In point of fact the contract of the appellant was not renewed.

The Revenue contended that before any taxpayer can claim to fall under section 13(1)(i) of the Ordinance he has to prove that he has retired from the service. Evidence must be adduced to support his claim. The Revenue also contended that the word "retiring" has got to be given its ordinary meaning.

After consideration I formed the view that the Special Commissioners were right in coming to the conclusion that the payment was not a retiring gratuity but a gratuity paid in respect of his employment with the company. This payment was not of the same nature as that made in *Knight's* case. There the notice by the company terminating the service of the taxpayer seemed to have produced the effect of retiring the taxpayer prematurely. T's employment was regarded as one which, unless the employers wanted him to go, was likely to continue as long as he faithfully carried out his duties. This was not so in the present case. Another important feature in regard to this payment which distinguishes it from the payment made in *Knight's* case is that, there, the socalled redundancy pay, held by the Federal Court to be compensation for loss of office or retiring gratuity, was in fact a payment "following a prior agreement or understanding." In the present case there was no such agreement or understanding requiring the company to make any payment to the appellant.

In my judgment the payment made to the appellant fell within the category and was of the same nature as the payment made to the taxpayer in *Heywood's* case. Although in *Heywood's* case the payment was made following a scheme drawn up by the company *ex-parte*, I am of the opinion that this should not alter the fact that the payment to the appellant

was a gratuity paid in respect of the appellant's employment with the company. Even though the company described it as "gratuity on retirement" such payment was not paid following any particular scheme drawn up by the company and neither was it paid pursuant to any provision in the service agreement. The appellant was clearly employed by the company for fixed terms under the contract of service which imposed no obligation on the company to make any payment. The decision to pay the appellant the sum of $74,954.32 was not made by the company until March 1966, presumably after the board of the company had taken into account the number of years' service the appellant had rendered the company. Although the company made the payment on its own accord it was clearly meant to be an ex-gratia payment made in reference to the services rendered by the appellant, in the nature of a reward at the end of the contract period. As submitted by Encik Nizar, and which I fully subscribe, it was a payment made in recognition of the appellant's past services with the company — for his loyalty and good service. To my mind the payment was in fact made to the appellant solely in respect and for reason of his employment with the company for over ten years and such payment was therefore gains or profits from an employment in respect of which tax is assessable.

At this juncture I shall proceed to deal with one other ground raised by the appellant. Mr. Woodhull submitted that the payment made to a former holder of an office or employment for the reason that he is no longer in the office is not a profit of the office or employment. In support of his contention Mr. Woodhull cited the case of *Beynon* v. *Thorpe*[7] in particular the following passage from the judgment of Rowlatt, J. who at page 14 said —

"It is nothing but a gift moved by the remembrance of past services already efficiently remunerated as services in themselves; it is merely a gift moved by that sort of gratitude or that sort of moral obligation if you please: it is merely a gift of that kind. In this case it happens to be very large; in many cases it is very small, but in all the cases it seems to me, whether it is a large gift like this or whether it is a small gift to a humble servant, they are exactly on the same footing as gifts which are made to a child or gifts which are made to any other person whom the giver thinks he ought to supply with funds for one reason or another;"

I fail to see any merit in the appellant's contention. The facts in that case differ very materially from the facts of the present case. The Commissioners in that case decided that the allowances were gifts of a personal nature in the light of the facts of that particular case. Rowlatt J. (at page 10) approved the Commissioners' decision stating that "... the Commissioners have had, so far as it is fact, plenty of evidence to find as they have; and so far as it is law, have decided rightly." It would seem to me the learned judge had taken into account the following facts when he (at page 1) approved the decision of the Commissioners —

"In 1922 the respondent resigned his position as managing director to a limited company on account of ill-health. but retained his seat on the board as an ordinary director until 1925. Between 1922 and 1925 he did no work for the company, attended no board meetings and received no remuneration as a director. It was the company's custom to give retiring employees voluntary pensions or allowances, and in 1923 the directors passed a resolution awarding the respondent during his retirement a pension of £5,000 a year, but this resolution was rescinded in 1925 and a final payment of £5,000 was voted to the respondent 'not as or because he is a 'director but as a personal gift'."

At page 11 the learned judge after considering the facts said —

"Now upon that it seems to me that the Commissioners must have taken the view that this pension or these payments were made to him not as remuneration for acting as an ordinary director — as a matter of fact he was merely on the list for he was ill and was excused attendance every time, he did nothing but merely give his name — but as an allowance. The Commissioners must have found that these sums were paid to him not as remuneration for being *de praesenti* an ordinary director but as an allowance in the nature of a pension in respect of the past services which were over and done with."

In this connection it is clear from the judgment of Rowlatt J. appearing further down on the same page that a sum may be paid after the termination of the services which nevertheless is for the service. His Lordship had this to say —

"Of course, as was pointed out by Lord Justice Atkin in *Cowan's* case[8] (and Lord Sterndale also took the same view), you may have a sum paid after the termination of the services which nevertheless is for the services. After the services are all over, you may say the services call for a supplement to the salary and may give the man another £50 or £5,000 in respect of the last year's work. But this is not that case at all, because these sums vary in amount according to the length of time which the man continues to live."

In the light of what I have stated it is my judgment that the decision in *Beynon's* case, *supra,* would not apply to the present case so as to bring the payment within the character and description of Rowlatt J. in *Beynon's* case.

In his last ground of appeal the appellant contended that every piece of evidence available, every fact found, cannot support the conclusion of the Special Commissioners.

The principle dealing with the circumstances under which an Appeal Court is justified in disturbing the findings of the Special Commissioners is contained in a passage in *Halsbury's* Laws of England third edition volume 20 at page 697 which reads as follows —

"The question whether or not there was any evidence for the commissioners to support their determination of a fact is a question of law [see *Edwards (Inspector of Taxes)* v. *Bairstow*[9]] and, where the only true and reasonable conclusion from the evidence contradicts the determination of the commissioners, the court must intervene to review their decision *(supra).* Moreover where it appears to an appellate court that no person, if properly instructed in the law and acting judicially, could have reached the determination in question, the court may proceed on the presumption that the misconception of law has been responsible for the determination. although the case stated shows on the face of it no misconception of law *(supra)."*

I do not propose to dwell at length on this ground. Suffice for me to say that I am satisfied that the Special Commissioners on the evidence before them and in the light of the facts found by them as admitted or proved, had come to the right conclusion. I am not, however, satisfied that the appellant has succeeded in establishing that on the facts before the Special Commissioners they could only reach at one and only true and reasonable finding and that such finding would contradict the determination of the Special Commissioners. In arriving at their findings the Special Commissioners

clearly proceeded to consider the facts as a whole. Their conclusions were drawn from the facts that were neutral in themselves except that they, to use the words of Lord Radcliffe at page 36 in *Edwards* v. *Bairstow, supra,* ".... take their colour from the combination of circumstances in which they are found to occur."

For the reasons that I have stated I would therefore confirm the Special Commissioners' findings and dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.*

NATIONAL ELECTRICITY BOARD EMPLOYEES UNION v. R. BALAN @ RAJA GOPAL

[A.C.J. (Wan Suleiman J.) April 19, 1974]
[Kuala Lumpur — Civil Appeal No. 29 of 1973]

Employment — Contract of service — Medical leave with full pay — Entitlement to — No express term — Whether implied term.

The respondent was employed under a contract of service by the appellants. The appellants had at various times granted the respondent medical leave on full pay, but had made such payments upon specific requests and with the special consent of the executive committee of the appellants' union. Approval had to be obtained before various periods could be treated as full pay periods. The respondent who had a long history of ill health which was known to the appellants gave notice of resignation whilst on medical leave. The appellants stopped his salary and the respondent commenced an action. The learned Senior President gave judgment for the respondent and the appellants appealed.

Held: (1) the appellants had established that wages were not payable during illness as a matter of right and therefore the appeal must be allowed;

(2) as the respondent had remained in the employ of the appellants until the expiry of the notice he was entitled to recover the medical expenses.

Case referred to:-

(1) *Orman* v. *Saville Sportswear Ltd.* [1960] 3 All E.R. 105 at p. 111.

CIVIL APPEAL.

F. Goonting for the appellants.

D. Puthucheary for the respondent.

Wan Suleiman J.: This is an appeal against the decision of the learned Senior President, Sessions Court, Kuala Lumpur in which he gave judgment for the respondent.

The respondent had by agreement dated 16th October, 1968 (Exhibit P1), with the appellants agreed to serve as the appellants' Union Executive Secretary for five years at a salary of $500 per month with effect from 1st December, 1968. On 25th September, 1972, the respondent gave appellants six months' notice of resignation in accordance with clause 14 of the Agreement to take effect from 1st October, 1972. In the meanwhile, from 15th September, 1972 the respondent claimed to be on medical leave, saying that a medical certificate had been submitted to the appellants. He said that at the time he gave notice on the 25th of September, 1972, he was on medical leave. His witness, Dr. Sundram, did mention that he had come to consult him in September, 1972, and since the appellants do not appear to dispute this claim, it would be safe to assume that he was indeed on medical leave at least from that date, and it would also appear that such leave was approved by the appellants for he was paid full salary from September 1972.

In any case. he subsequently obtained medical certificates covering a period of six months commencing on 23rd October, 1972 and terminating on 22nd April, 1973, during which period he did not turn up for work.

The respondent claimed six months' salary from 1st October, 1972 and one-third of the medical fees incurred by him in accordance with the Agreement.

The appellants denied he was entitled to the salary for that period, contending that —

(a) he had not turned up for work during the relevant period; and

(b) that he had engaged in business other than that of the appellants/defendants, in breach of Clause 9 of the Agreement.

The appeal before me was argued on that basis.

I shall consider the issue (b) first. I am inclined to agree with the learned Senior President that despite the fact that the respondent had himself admitted to having assisted in a small way at the Sharikat Pioneer Commercial Agency, for which he was paid small sums, which were more in the nature of gifts, such activities did not amount to a breach of Clause 9 of the Agreement.

The success or failure of this appeal will therefore rest on the remaining issue, *i.e.* was he entitled to be paid during the period he had not turned up for work? The Agreement is silent as to whether he had the right to claim his salary during absence from work on account of illness.

That there was illness such as to justify medical leave for the full period of six months granted to him by Dr. Sundram, there was ample evidence which the learned Senior President accepted. Indeed, the appellants were well aware of the respondent's state of chronic ill-health for some years before they entered into the agreement with him in 1968. I would therefore with respect agree with this finding of the learned Senior President. The question is whether he is entitled to be paid during such period.

In paragraph 728 of Chitty on Contracts, Vol II, 23rd Ed., appears the following passage:

"The right of the employee to claim his salary or wages during his absence from work on account of his illness or injury depends on the terms of his contract. If no express term deals with the matter, the court must attempt to infer an implied term from all the relevant circumstances."

In *Orman* v. *Saville Sportswear Ltd.*,[1] an authority which was considered by the learned Senior President, it was held that —

"Where the written terms of the contract of service are silent as to what is to happen in regard to the employee's right to be paid whilst he is absent from work due to sickness, the employer remains liable to continue paying so long as the contract is not determined by proper notice, except where a condition to the contrary can properly be inferred from all the facts and the evidence in the case. If the employer seeks to establish an implied condition that no wages are payable, it is for him to make it out, and the court, in construing the written contract, will not accept any implied term which will not pass the test laid down by Scrutton, L.J. in *Reigate* v *Union Manufacturing Co. (Ramsbottom)* ([1918] 1 K.B. at p. 605).